

Louisiana Law Review

Volume 69 | Number 4
Summer 2009

Grass Roots Immigration Reform

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Repository Citation

Susan M. Bartlett, *Grass Roots Immigration Reform*, 69 La. L. Rev. (2009)
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Grass Roots Immigration Reform

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I. INTRODUCTION

Immigration issues are increasingly becoming a political hotbed as federal immigration reforms have floundered, illegal immigration continues to rise, and governments fight to control the unwanted consequences of a perceived inadequate federal policy.¹

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1. Janet Napolitano, Governor of Arizona, stated the following in enacting Arizona Revised Statute section 23-212: “[It] is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration

Former Commissioner of the U.S. Immigration and Naturalization Service, Dorris Meisner, summarized the current state of immigration affairs within the nation, "I don't think there's been a time like this in our lifetime Even though immigration is always unsettling and somewhat controversial, we haven't seen this kind of intensity and widespread, deep-seated anger for almost 100 years."²

Cities and states have responded to the immigration influx in a variety of ways, but most recently there has been a bevy of legislative and enforcement activities. Legislative actions range from English-only ordinances to occupancy ordinances, which aim to prevent the harboring of illegal immigrants, to employer ordinances that suspend and even revoke business licenses for employers who persistently employ illegal workers. This list is far from comprehensive, as states and cities have created numerous other ordinances in efforts to control the consequences of increased illegal immigration.

According to the National Conference of State Legislatures, 570 pieces of immigration legislation were introduced in 2006.³ Of these, eighty-four bills were signed into law, which is more than double the number that were enacted in 2005. In 2006, thirty-two states enacted immigration laws.⁴ More recently, the *New York Times* reported that state legislatures across the nation have considered 1,404 pieces of legislation concerning immigration.⁵ The increase in statutes that address illegal immigration seems to suggest that illegal immigration is a primary concern for many state and local governments.

reforms our country needs. Because of Congress' failure to act, states like Arizona have no choice but to take strong action to discourage the further flow of illegal immigration through our borders." Kate Riley, Opinion, *Piecemeal Immigration Reform: Scrambling to Cover for Congress*, SEATTLE TIMES, July 9, 2007, http://seattletimes.nwsourc.com/html/opinion/2003778001_riley09.html. See ARIZ. REV. STAT. ANN. § 23-212 (1995 & Supp. 2008).

2. Dave Montgomery, *Border Debate Grows Angrier*, THE NEWS & OBSERVER, Aug. 19, 2007, <http://www.newsobserver.com/110/story/675575.html>.

3. NAT'L CONFERENCE OF STATE LEGISLATURES, 2006 STATE LEGISLATION RELATED TO IMMIGRATION: ENACTED AND VETOED, <http://www.ncsl.org/programs/immig/6ImmigEnactedLegis3.htm> (2006).

4. *Id.*

5. Julia Preston, *Surge In Immigration Laws Around U.S.*, N.Y. TIMES, Aug. 6, 2007, http://www.nytimes.com/2007/08/06/washington/06immig.html?_r=1&scp=1&sq=august6,2007immigration&st=cse.

Illegal immigration imposes a heavy burden upon cities and states because they are forced to absorb the increased costs.⁶ In response to the suburban immigration influx, cities have begun to enact municipal ordinances that attempt to reduce incentives for illegal entrants to remain in their cities. The two types of ordinances that prevail throughout the nation, and those that are receiving the most criticism, are the so called tenancy provisions and employer provisions.”

The tenancy provisions attempt to rely upon federal prohibitions against harboring illegal aliens by barring landlords from renting residential property to illegal immigrants. The procedures for enacting these ordinances differ slightly from city to city, but in all cases a tenant is required to submit identity documentation to either the landlord or the city that then retains the information. If there is a valid complaint filed that alleges illegal immigrants are being harbored, then the identity data is collected and the legal status of the individual is verified with the federal government. If the report verifies that the renter has an illegal status, the city notifies the landlord. Thereafter, the landlord must either evict the tenant or face repercussions: prohibition from gathering rent and possible license revocation by city or state officials.

In contrast, the employer provisions invoke local licensing power, as provided to states and cities in United States Code Title 8, section 1324, to suspend or revoke business licenses from those who employ illegal workers.⁷ Pursuant to a valid complaint, a city code enforcement officer obtains identity documentation from the employer and verifies the worker’s legal status with the federal government. If the federal government reports that the applicant is an illegal immigrant, the employer is thereafter required to fire the employee or face license suspension or revocation.

6. See FED’N FOR AM. IMMIGRATION REFORM, *THE COSTS TO LOCAL TAXPAYERS FOR ILLEGAL OR “GUEST” WORKERS* (2006), http://www.fairus.org/site/PageServer?pagename=research_localcosts. This study estimates that the economic costs to cities of providing education, emergency medical care, and incarceration to illegal immigrants is \$36 million with the expectation that this amount will rise to \$61.5 million by 2010. This study also summarizes state conducted studies of the impact of illegal immigration, with the following results: Arizona: \$1.3 billion (as of 2004), California: \$10.5 billion (as of 2004), Florida: \$1.7 billion (as of 2005), New Jersey: \$2.1 billion (as of 2006), New York: \$5.2 billion (as of 2006), Texas: \$4.7 billion (as of 2005).

7. 8 U.S.C. § 1324a(h)(2) (2006), providing: “The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”

These ordinances have been challenged as a violation of the Supremacy Clause.⁸ Despite recent rulings, this Comment argues that employer provisions are not preempted by federal law.⁹ Congress expressly reserved to states and cities the power to revoke licenses for employers knowingly employing illegal entrants. Therefore, states and cities are authorized to use their inherent police power to protect their citizens. On the other hand, this Comment argues that the tenancy provisions are likely preempted and thus unconstitutional under the Supremacy Clause. The tenancy provisions appear to constitute an attempt to institute an alien registration system that imposes additional burdens upon aliens that federal immigration policy does not and thus are preempted. More generally, this Comment argues that not all state or local ordinances that indirectly impact immigration issues are preempted and examines the employer and tenancy ordinances as a means to illustrate ordinances that are preempted and those that are not. This Comment asserts that if an ordinance is to avoid being preempted it must ensure the following criteria are met: (1) the ordinance must utilize inherent police power to protect citizens; (2) it must not undermine Congressional policy objectives; (3) it must not conflict with federal law, nor may it impose additional burdens upon aliens that Congress has not imposed; and (4) it must not directly regulate aliens. If these factors are met, then legislation that indirectly impacts immigration issues will not be preempted.

Part II of this Comment examines the current preemption challenges to the ordinances by detailing the jurisprudential test and the recent cases where this test has been applied. Part III analyzes recent rulings and applies the three prong preemption test as identified in *DeCanas v. Bica* to evaluate the constitutionality of the employer provision and the illegality of tenancy ordinances.¹⁰ The July 2007 decision in *Lozano v. City of Hazleton* is the most in-depth court analysis of the preemption debate on these two provisions and thus serves as a framework for the analysis. Part IV is a brief examination of the policy concerns associated with state and local ordinances. Part V provides recommendations for creating legislation that both serves local interests in reducing the negative effects of increased illegal immigration and withstands constitutional scrutiny.

8. The ordinances have been challenged on several grounds such as due process, equal protection, violation of the Contract Clause, as well as violations under the Supremacy Clause. This Comment will *only* address the provisions under a Supremacy Clause analysis.

9. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

10. *DeCanas v. Bica*, 424 U.S. 351 (1976).

II. BACKGROUND

A. Supremacy Clause

Recent municipal ordinances that attempt to reduce the negative impact of illegal immigration upon communities have been declared invalid pursuant to the Supremacy Clause.¹¹ The Supreme Court created a three-prong preemption test in order to determine whether federal law preempts and thus invalidates subordinate government legislation: express preemption, conflict preemption, and field preemption.¹² If any prong of this test is met, then the federal law will preempt the subordinate legislation.

Express preemption exists when federal law explicitly, specifically, and expressly precludes state or local laws. If federal law expressly precludes local concurrent regulation or enforcement, then the local ordinance is invalid both statutorily and constitutionally.¹³ Courts have found that the employer provisions are expressly preempted reasoning that section 1324 prohibits concurrent legislation.¹⁴

A statute is “conflict preempted” if it conflicts with federal law and thus makes compliance with both state and federal law impossible.¹⁵ Conflict preemption also may occur if congressional objectives or policy goals are undermined. Because a conflict preemption analysis not only encompasses the express provisions of the statute but also congressional objectives, which may be vague and ambiguous, it is a difficult area to analyze.

Field preemption occurs when Congress has so pervasively regulated within an area that there is no room left for states and local governments to regulate or when Congress has expressly held that the states are preempted. As described in *Lozano v. City of Hazleton*, “field preemption exists where the federal regulatory scheme is ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’”¹⁶

11. Article VI, Clause 2 of the Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State to the contrary notwithstanding.

U.S. CONST. art. IV, cl. 2.

12. *DeCanas v. Bica*, 424 U.S. 351 (1976).

13. *Green v. Fund Asset Mgmt.*, 245 F.3d 214, 222 (3d Cir. 2001).

14. 8 U.S.C. § 1324 (2006).

15. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 899 (2000).

16. 496 F. Supp. 2d 477, 518 (M.D. Pa. 2007) (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In determining whether the ordinances are preempted, the first step is to establish whether the ordinances are regulating immigration law or other local issues. Immigration regulation is an exclusive power of the federal government and thus ordinances that attempt to regulate in this area are inherently invalid under the Supremacy Clause. The United States Supreme Court stated in *DeCanas v. Bica* that only the federal government may issue “a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a *legal* entrant may remain.”¹⁷ However, the Supreme Court also stated the following: “the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.”¹⁸ Furthermore, the Eastern District Court of Virginia stated:

it is the creation of standards for determining who is and is not in this country legally that constitutes a regulation of immigration in these circumstances, not whether a state’s determination in this regard results in the actual removal or inadmissibility of any particular alien¹⁹

Given the United States Supreme Court’s ruling in *DeCanas*, as well as the interpretation of this ruling by lower courts, it is clear that state legislation or local ordinances, which indirectly impact immigration policy, are not per se preempted. Nevertheless, in *Lozano v. City of Hazleton* and in *Farmer’s Branch*, the respective courts found that the cities’ attempts to regulate businesses and rental properties were preempted because of the impact that these ordinances place upon immigration policy. Courts found that the local ordinances conflicted with federal authority to exclusively regulate immigration policy.

B. Case Law: Municipal Ordinances Challenged Upon Preemption Grounds

1. Lozano v. City of Hazleton

One of the earliest municipal ordinances taking aim at illegal immigrants originated in the small city of Hazleton, Pennsylvania. After declaring that illegal immigration increased crime and

17. 424 U.S. 351, 355 (1976) (emphasis added).

18. *Id.*

19. *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 602 (E.D. Va. 2004).

medical and education costs in the city, Hazleton passed two ordinances aimed at reducing these expenses.

In its ordinance, Hazleton focused upon employers who knowingly employ illegal immigrants. Ordinance 2006-18, the Illegal Immigration Relief Act (IIRA), authorized the city to suspend the business license of an employer who either refuses to verify an employee's legal status or who continues to employ the illegal worker despite knowledge that the worker is illegally within the country.²⁰ The city also vowed to revoke licenses of property

20. Hazleton, Pa., Illegal Immigration Relief Act Ordinance § 4 (July 13, 2006), providing:

A. It is unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City. Every business entity that applies for a business permit to engage in any type of work in the City shall sign an affidavit, prepared by the City Solicitor, affirming that they do not knowingly utilize the services or hire any person who is an unlawful worker.

B. Enforcement: The Hazleton Code Enforcement Office shall enforce the requirements of this section.

(1) An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any City official, business entity, or City resident. A valid complaint shall include an allegation which describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred.

(2) A complaint which alleges a violation solely or primarily on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.

(3) Upon receipt of a valid complaint, the Hazleton Code Enforcement Office shall, within three business days, request identity information from the business entity regarding any persons alleged to be unlawful workers. The Hazleton Code Enforcement Office shall suspend the business permit of any business entity which fails, within three business days after receipt of the request, to provide such information. In instances where an unlawful worker is alleged to be an unauthorized alien, as defined in United States Code Title 8, subsection 1324a(h)(3), the Hazleton Code Enforcement Office shall submit identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373, the immigration status of such person(s), and shall provide the business entity with written confirmation of that verification.

(4) The Hazleton Code Enforcement Office shall suspend the business permit of any business entity which fails correct a violation of this section within three business days after notification of the violation by the Hazleton Code Enforcement Office.

The Hazleton Code Enforcement Office shall not suspend the business permit of a business entity if, prior to the date of the violation, the business entity had verified the work authorization of the alleged unlawful worker(s) using the Basic Pilot Program.

managers or property owners who rented dwelling units to illegal

(6) The suspension shall terminate one business day after a legal representative of the business entity submits, at a City office designated by the City Solicitor, a sworn affidavit stating that the violation has ended.

(a) The affidavit shall include a description of the specific measures and actions taken by the business entity to end the violation, and shall include the name, address and other adequate identifying information of the unlawful workers related to the complaint.

(b) Where two or more of the unlawful workers were verified by the federal government to be unauthorized aliens, the legal representative of the business entity shall submit to the Hazleton Code Enforcement Office, in addition to the prescribed affidavit, documentation acceptable to the City Solicitor which confirms that the business entity has enrolled in and will participate in the Basic Pilot Program for the duration of the validity of the business permit granted to the business entity.

(7) For a second or subsequent violation, the Hazleton Code Enforcement Office shall suspend the business permit of a business entity for a period of twenty days. After the end of the suspension period, and upon receipt of the prescribed affidavit, the Hazleton Code Enforcement Office shall reinstate the business permit. The Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate federal enforcement agency, pursuant to United States Code Title 8, section 1373. In the case of an unlawful worker disqualified by state law not related to immigration, the Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate state enforcement agency.

C. All agencies of the City shall enroll and participate in the Basic Pilot Program.

D. As a condition for the award of any City contract or grant to a business entity for which the value of employment, labor or, personal services shall exceed \$10,000, the business entity shall provide documentation confirming its enrollment and participation in the Basic Pilot Program.

E. Private Cause of Action for Unfairly Discharged Employees

(1) The discharge of any employee who is not an unlawful worker by a business entity in the City is unfair businesses practice if, on the date of the discharge, the business entity was not participating in the Basic Pilot program and the business entity was employing an unlawful worker.

(2) The discharged worker shall have a private cause of action in the Municipal Court of Hazleton against the business entity for the unfair business practice. The business entity found to have violated this subsection shall be liable to the aggrieved employee for:

(a) three times the actual damages sustained by the employee, including but not limited to lost wages or compensation from the date of the discharge until the date the employee has procured new employment at an equivalent rate of compensation, up to a period of one hundred and twenty days; and

(b) reasonable attorney's fees and costs.

immigrants.²¹ Under this tenancy provision, the city took aim at those “harboring” illegal entrants.²² Hazleton’s ordinances were

21. Hazleton, Pa., Illegal Immigration Relief Act Ordinance § 5 (July 13, 2006), providing:

A. It is unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.

(1) For the purposes of this section, to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall be deemed to constitute harboring. To suffer or permit the occupancy of the dwelling unit by an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall also be deemed to constitute harboring.

(2) A separate violation shall be deemed to have been committed on each day that such harboring occurs, and for each adult illegal alien harbored in the dwelling unit, beginning one business day after receipt of a notice of violation from the Hazleton Code Enforcement Office.

(3) A separate violation of this section shall be deemed to have been committed for each business day on which the owner fails to provide the Hazleton Code Enforcement Office with identity data needed to obtain a federal verification of immigration status, beginning three days after the owner receives written notice from the Hazleton Code Enforcement Office.

B. Enforcement: The Hazleton Code Enforcement Office shall enforce the requirements of this section.

(1) An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any official, business entity, or resident of the City. A valid complaint shall include an allegation which describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred.

(2) A complaint which alleges a violation solely or primarily on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.

(3) Upon receipt of a valid written complaint, the Hazleton Code Enforcement Office shall, pursuant to United States Code Title 8, section 1373(c), verify with the federal government the immigration status of a person seeking to use, occupy, lease, or rent a dwelling unit in the City. The Hazleton Code Enforcement Office shall submit identity data required by the federal government to verify immigration status. The City shall forward identity data provided by the owner to the federal government, and shall provide the property owner with written confirmation of that verification.

(4) If after five business days following receipt of written notice from the City that a violation has occurred and that the immigration status of any alleged illegal alien has been verified, pursuant to United States Code Title 8, section 1373(c), the owner of the dwelling unit fails to

immediately challenged, and in July 2007 the Middle District Court of Pennsylvania declared both ordinances unconstitutional. The court declared the employer provision preempted on all three prongs created under *DeCanas*: express, conflict, and field.²³ The court also declared the tenancy provision conflict preempted.²⁴

The *Lozano* court held that section 1324 (IRCA) expressly preempts Hazleton's ordinance because the license suspension or revocation essentially amounts to a civil sanction. The court reasoned that because the federal statute expressly preempts state and local governments from imposing civil or criminal sanctions, it also expressly preempts cities from suspending or revoking licenses for employing illegal entrants. Despite this finding, the *Lozano* court analyzed the ordinances under the other preemption prongs.

correct a violation of this section, the Hazleton Code Enforcement Office shall deny or suspend the rental license of the dwelling unit.

(5) For the period of suspension, the owner of the dwelling unit shall not be permitted to collect any rent, payment, fee, or any other form of compensation from, or on behalf of, any tenant or occupant in the dwelling unit.

(6) The denial or suspension shall terminate one business day after a legal representative of the dwelling unit owner submits to the Hazleton Code Enforcement Office a sworn affidavit stating that each and every violation has ended. The affidavit shall include a description of the specific measures and actions taken by the business entity to end the violation, and shall include the name, address and other adequate identifying information for the illegal aliens who were the subject of the complaint.

(7) The Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate federal enforcement agency, pursuant to United States Code Title 8, section 1373.

(8) Any dwelling unit owner who commits a second or subsequent violation of this section shall be subject to a fine of two hundred and fifty dollars (\$250) for each separate violation. The suspension provisions of this section applicable to a first violation shall also apply.

(9) Upon the request of a dwelling unit owner, the Hazleton Code Enforcement Office shall, pursuant to United States Code Title 8, section 1373(c), verify with the federal government the lawful immigration status of a person seeking to use, occupy, lease, or rent a dwelling unit in the City. The penalties in this section shall not apply in the case of dwelling unit occupants whose status as an alien lawfully present in the United States has been verified.

22. "Harboring" is defined as "[t]he act of affording lodging, shelter, or refuge to a person, [especially] a criminal or illegal alien." BLACK'S LAW DICTIONARY 733 (8th ed. 2004).

23. 496 F. Supp. 2d 477.

24. *Id.*

The court analyzed field preemption, the second prong of the preemption test, by focusing upon the federal interest and the pervasiveness of federal immigration regulation. With respect to federal interest, the court held the city's ordinance invalid reasoning that Congress is constitutionally vested with the authority to create uniform immigration policy and thus retains the exclusive power to legislate on immigration matters.²⁵ In its examination of the pervasiveness of the regulation, the court also held that "IRCA is a 'comprehensive scheme' which therefore leaves no room for state regulation."²⁶ It based its conclusion on the fact that IRCA has explicit provisions that deal with the employment of illegal workers. The court stated that "Congress has indicated that one of the central features of federal immigration policy is controlling the employment of unauthorized workers and explains the manner in which an employer may be found liable for violating the status and also how the employer can seek review of adverse decisions."²⁷ The court found that federal law creates a comprehensive program governing the employment of illegal workers and thus a city or state is prohibited from enacting legislation in this area. It is important to note that this holding prevents a city or a state from adopting any legislation concerning immigration even if the ordinance has the same objective and end result as the federal statute, which is assumedly to deter illegal immigration.

The final prong of the preemption analysis was conflict preemption. The court found Hazleton's ordinance conflict preempted reasoning that it conflicted with federal legislation and with Congressional policy. First, the court held the ordinance conflict preempted, because Hazleton authorized a code enforcement officer to verify employee documentation with the federal government while the federal scheme gave the employer sole responsibility to examine legal status documentation.²⁸ Second, the court found Hazleton's ordinance was conflict preempted, because it did not expressly release employers from the verification of casual domestic employees or independent

25. Article I, Section 8 vests Congress with the power to establish a uniform rule of naturalization. U.S. CONST. art. I, § 8.

26. *Lozano*, 496 F. Supp. 2d at 523.

27. *Id.*

28. A recent Associated Press story reported one illegal worker's response to state ordinances which revoked employers' licenses. Velasquez, who worked at a Phoenix grocery store, said he hadn't been asked to prove that he was in the country legally, even though he had been working in the country for over one year. *See Some Fear Arizona Will Send Some Packing*, ALBUQUERQUE TRIB., Sept. 12, 2007.

contractors, which are not covered by the federal requirements. Third, the court determined that Hazleton's ordinance imposed "strict liability without the element of knowledge" and thereby conflicted with federal law, which contains a knowledge requirement. The fourth conflict the court found was Hazleton's requirement that all city agencies participate in the Basic Pilot Program while the federal program made the Basic Pilot Program voluntary. Fifth, the court found that the difference in time frames between the city ordinance and federal law also created a conflict. Under the federal statute, an employer may not terminate an employee for at least ten days while the legal status of the employee is being determined. The Hazleton ordinance, on the other hand, suspends the license of the employer within three days after the employer is officially notified of the employee's illegal status. Sixth, the court found the appeals process between the federal statute and the local ordinance were in conflict. Hazleton's ordinance did not expressly provide an appeal to the *employee* but rather allowed the *employer* to appeal. In contrast, the federal law provided this appeal right directly to the employee. Seventh, the court found that the Hazleton ordinance conflicted with federal policy objectives. The court reasoned that "[t]oo stringent of an enforcement system will result in the wrongful removal of United States citizens and legal immigrants."²⁹ The court also cited the following policy reasons for its finding that the two laws were in conflict: "Excessive enforcement jeopardizes our alliances and cooperation with regard to matters such as immigration enforcement, drug interdiction and counter-terrorism investigations."³⁰ The *Lozano* court also determined that the Hazleton ordinance lacked an antidiscrimination clause which the federal statute contains and thus was in conflict with federal objectives.

The court invalidated the tenancy provision finding the ordinance conflict preempted. The court based its decision upon two grounds. First, the ordinances "[a]ssume that the federal government seeks the removal of all undocumented aliens."³¹ The court examined the federal illegal alien deportation process and concluded that the system was complex and thus unable to be reduced to concrete rules of deportation. The court found the federal government may allow an alien to remain in the nation despite an illegal status. Upon these grounds the court determined that Hazleton's method of determining legal status was inadequate. Second, the court found that the city's ordinance imposed a burden

29. *Lozano*, 496 F. Supp. 2d at 528.

30. *Id.*

31. *Id.* at 532.

upon aliens that federal policy did not because it restricted an alien's potential regional residences. The court found that these flaws in the ordinance not only directly imposed burdens upon aliens but also functioned in such a manner as to allow the city to regulate immigration policy. For these reasons the court rendered the ordinance invalid. Therefore, similar to the employer provisions, the tenancy provisions were also deemed to be conflict preempted.

2. *Valley Park, Missouri*

Hazleton was not alone in enacting these types of municipal ordinances; Valley Park, Missouri also enacted both employer and tenancy provisions that nearly mirror Hazleton's.³² Similarly to Hazleton, Valley Park aimed to eliminate the harboring of illegal entrants by targeting landlords. Section 5(b)(5) of the ordinance authorizes the city to revoke the occupancy permit for a property owner or manager who knowingly rents units to illegal entrants.³³ The Eastern District Court of Missouri did not address the merits of the preemption challenge but rather remanded the case due to a lack of federal jurisdiction.³⁴

3. *Farmers Branch, Texas*

In a tenancy ordinance that differs slightly from Valley Park's and Hazleton's, the city of Farmers Branch, Texas requires property managers to request and review original documents of eligible citizenship or immigration status.³⁵ The Northern District

32. Valley Park, Mo., Ordinance No. 1708 § 4(b)(4) (July 17, 2006) provides the following: "The Valley Park Code Enforcement Officer shall suspend the business license of any business entity which fails to correct a violation of this section within three (3) business days after notification of the violation by the Valley Park Code Enforcement Office."

33. Section 5(b)(5) provides:

For the period of suspension, the owner of the dwelling unit shall not be permitted to collect any rent, payment fee, or another form of compensation from, or on behalf of any tenant or occupant in the dwelling unit. In addition, the City of Valley Park shall not issue occupancy permits for any properties owned during the suspension period.

Id.

34. Reynolds v. Valley Park, No. 4:06CV01487 ERW, 2006 WL 3331082, at *8 (E.D. Mo. Nov. 15, 2006). In remanding the case the court did state that Plaintiffs are "[c]hallenging the validity of a local ordinance . . . they do not state a claim under federal law . . ." *Id.*

35. Farmers Branch, Tex., Ordinance No. 2892 (repealed 2006), providing:

of Texas found the ordinance preempted reasoning that the city was “doing more than adopting federal immigration requirements.”³⁶ The court based its determination upon the fact that the ordinance did not use federal immigration standards for defining who was a noncitizen but rather used Housing and Urban Development benefit guidelines to determine legal status.³⁷

The owner and/or property manager shall require as a prerequisite to entering into any lease or rental arrangement, including any lease or rental renewals or extensions, the submission of evidence of citizenship or eligible immigration status for each tenant family consistent with subsection (3).

(3) Evidence of citizenship or eligible immigration status.

Each family member, regardless of age, must submit the following evidence to the owner and/or property manager.

i. For U.S. citizens or U.S. nationals, the evidence consists of a signed declaration of U.S. citizenship or U.S. nationality. The verification of the declaration shall be confirmed by requiring presentation of a United States passport or other appropriate documentation in a form designated by the Immigration and Customs Enforcement Department (“ICE”) as acceptable evidence of citizenship status.

ii. For all other non-citizens, the evidence consists of:

a. A signed declaration of eligible immigration status;

b. A form designated by the Immigration and Customs Enforcement Department (“ICE”) as acceptable evidence of immigration status; and

c. A signed verification consent form.

(4) General.

i. The owner and/or property manager shall request and review original documents of eligible citizenship or immigration status. The owner and/or property manager shall retain photocopies of the documents for its own records and return the original documents to the family. Copies shall be retained by the owner and/or property manager for a period of not less than two (2) years after the end of the family’s lease or rental.

ii. For each family member, the family shall be required to submit evidence of citizenship or immigration status only once during continuous occupancy. The owner and/or property manager is prohibited from allowing the occupancy of any unit by any family which has not submitted the required evidence of citizens.

36. *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 769 (N.D. Tex. 2007).

37. The Department of Housing and Urban Development is a federal agency whose mission is to “[i]ncrease homeownership, support community development and increase access to affordable housing free from discrimination.” U.S. Dep’t of Housing & Urban Dev.: HUD’s Mission, <http://www.hud.gov/library/bookshelf12/hudmission.cfm> (last visited Feb. 27, 2009). Rather than using ICE guidelines, Valley Park attempted to use HUD guidelines, which determine subsidies for noncitizens, as the city’s guideline differentiating between legal or illegal aliens.

4. Arizona

More recently, in July 2007 Arizona enacted legislation which forces employers who are licensed by the state of Arizona to enroll in the federal Basic Pilot Program.³⁸ Additionally, the state legislation allows for suspension and revocation of licenses if employers knowingly or with reckless disregard persistently hire and employ illegal immigrants.³⁹ Arizona's statute differs from

38. According to the Center for Immigration Studies, the Basic Pilot Program is a voluntary federal program expanded by Congress in 2004 that allows employers to verify their employees' legal status. Participating employers submit I-9 information to the Department of Homeland Security within three days of hiring the employee. The Department of Homeland Security then transmits the data to the Social Security Administration who in turns verifies the legitimacy of the documents. The employer is then given verification of the employee's legal status and if the employee does not contest the report the employer must terminate the employee. JESSICA M. VAUGHAN, CTR. FOR IMMIGRATION STUDIES, VERIFICATION OF EMPLOYMENT AUTHORIZATION: FEDERAL BASIC PILOT PROGRAM IS AN EFFECTIVE AND EMPLOYER-FRIENDLY TOOL FOR IMMIGRATION LAW COMPLIANCE (2006), <http://www.cis.org/articles/2006/jmvttestimony022106.html>.

39. ARIZ. REV. STAT. ANN. § 23-212 (1995 & Supp. 2008), providing:

Employment of unauthorized aliens; prohibition; false and frivolous complaints; violation; classification; license suspension and revocation; affirmative defense.

A. An employer shall not intentionally employ an unauthorized alien or knowingly employ an unauthorized alien. B. On receipt of a complaint that an employer allegedly intentionally employs an unauthorized alien or knowingly employs an unauthorized alien, the attorney general or county attorney shall investigate whether the employer has violated subsection A. When investigating a complaint, the attorney general or county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code § 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States. An alien's immigration status or work authorization status shall be verified with the federal government pursuant to 8 United States Code § 1373(c). A person who knowingly files a false and frivolous complaint under this subsection is guilty of a class 3 misdemeanor.

C. If, after an investigation, the attorney general or county attorney determines that the complaint is not frivolous:

1. the attorney general or county attorney shall notify the United States immigration and customs enforcement of the unauthorized alien.
2. The attorney general or county attorney shall notify the local law enforcement agency of the unauthorized alien.
3. The attorney general shall notify the appropriate county attorney to bring an action pursuant to subsection D if the complaint was originally filed with the attorney general.

...

F. On a finding of a violation of subsection A:

1. For a first violation during a three year period that is a knowing violation of subsection A, the court:

(a) shall order the employer to terminate the employment of all unauthorized aliens.

(b) Shall order the employer to be subject to a three year probationary period. During the probationary period the employer shall file quarterly reports with the county attorney of each new employee who is hired by the employer at the specific location where the unauthorized alien performed work.

(c) Shall order the employer to file a signed sworn affidavit with the county attorney within three business days after the order is issued. The affidavit shall state that the employer has terminated the employment of all unauthorized aliens and that the employer will not intentionally or knowingly employ an unauthorized alien. The court shall order the appropriate agencies to suspend all licenses subject to this subdivision that are held by the employer if the employer fails to file a signed sworn affidavit with the county attorney within three business days after the order is issued. All licenses that are suspended under this subdivision shall remain suspended until the employer files a signed sworn affidavit with the county attorney.

(d) May order the appropriate agencies to suspend all licenses described in subdivision (c) of this paragraph that are held by the employer for not to exceed ten business days. The court shall base its decision to suspend under this subdivision on any evidence or information submitted to it during the action for a violation of this subsection and shall consider the following factors, if relevant:

(i) The number of unauthorized aliens employed by the employer.

(ii) Any prior misconduct by the employer.

(iii) the degree of harm resulting from the violation.

(iv) Whether the employer made good faith efforts to comply with any applicable requirements.

(v) The duration of the violation.

(vi) The role of the directors, officers or principals of the employer in the violation.

(vii) any other factors the court deems appropriate.

2. For a first violation during a five year period that is an intentional violation of subsection A, the court shall:

(a) Order the employer to terminate the employment of all unauthorized aliens.

(b) Order the employer to be subject to a five year probationary period. During the probationary period the employer shall file quarterly reports with the county attorney of each new employee who is hired by the employer at the specific location where the unauthorized alien performed work.

3. For a second violation of subsection A during the period of probation, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer and that are necessary to operate the employer's business at the employer's business location where the unauthorized alien performed work. If a license is not necessary to operate the employer's business at the specific location

Valley Park, Farmers Branch, and Hazleton in two key ways: the Arizona statute is specific and unambiguous. For example, the statute expressly states the following: “A state, county, or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.” Arizona’s express restriction on independent determinations by state officials thus attempts to reduce ambiguity and thereby avoid a constitutional attack. Additionally, Arizona’s statute cites to United States Code Title 8, section 1373(c) four times in the two page statute.⁴⁰ This reliance upon the federal statute appears to be an obvious attempt to prove that the State is not attempting to independently regulate immigration matters.⁴¹

It is important to note that the preceding statutes are mere examples of ordinances and legislation that cities and states have promulgated in their attempts to mitigate the economic and social costs associated with illegal immigration. There are numerous other ordinances that have arisen, such as English-only ordinances, state legislation that authorizes ID card issuance to illegal immigrants, and state restrictions for student financial aid to illegal aliens. Cities and states will undoubtedly continue to utilize their police powers to enact not only these provisions, but variations of them as well. Confusion, frustration, and discontent will continue to escalate until this issue is resolved.

where the unauthorized alien performed work, but a license is necessary to operate the employer’s business in general, the court shall order the appropriate agencies to permanently revoke all licenses that are held by the employer at the employer’s primary place of business. On receipt of the order and notwithstanding any other law, the appropriate agencies shall immediately revoke the licenses.

40. 8 U.S.C. § 1373(c) (2006). Explaining the obligation to respond to inquiries, this section provides:

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

41. Arizona’s statute was immediately challenged upon preemption grounds. The U.S. District Court in Arizona upheld the statute and upon appeal the United States’s Court of Appeal for the Ninth Circuit affirmed the District Court’s holding. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009).

III. ANALYSIS

The *Lozano* decision has been the most comprehensive judicial analysis of the preemption debate on the tenancy and employer provisions; thus, this Comment uses that decision as a framework for the preemption analysis. The following Section applies each prong of the preemption test, as defined in *DeCanas v. Bica*, to the employer and tenancy provisions to illustrate that employer provisions are valid because they do not violate any prong of the three part test.⁴² This Section also illustrates that the tenancy provisions are invalid because they fail both the conflict and field preemption tests. The distinctions between the employer provisions and the tenancy provisions serve as a frame for identifying those components which render them either valid or invalid.

*A. Employer Provisions Analysis**1. Express Preemption*

Local ordinances that suspend or revoke the business licenses of employers who knowingly or with reckless disregard employ illegal immigrants are not preempted but rather are expressly authorized by Congress. In support of this contention is the plain language of United States Code Title 8, subsection 1324a(h)(2), which preempts state or local laws *except* licensing. Subsection 1324a(h)(2) provides the following: “[T]he provisions of this section preempt any State or local laws imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens.”⁴³

Thus, although the statute expressly preempts states from imposing civil or criminal sanctions, the plain language of subsection 1324a(h)(2) provides that states and local governments may regulate the licenses of those who employ, recruit, or refer for a fee for employment, unauthorized aliens.

Despite the statute’s plain language, courts have refused to allow local governments to utilize their licensing authority. For instance, the *Lozano* court insisted that allowing the city to revoke business licenses for violating federal law would violate Congress’ central control over illegal immigrant workers.⁴⁴ Clearly, Congress

42. *DeCanas v. Bica*, 424 U.S. 351 (1975).

43. 8 U.S.C. § 1324a(h)(2) (2006).

44. The *Lozano* court stated: “Immigration is a national issue. The United States Congress has provided complete and thorough regulations with regard to

intended for central control, but this was not its only intent as illustrated by the plain language of the statute as well as congressional records. House reports, as examined in *Lozano v. City of Hazleton*, uncovered that Congress' intent regarding local government control of licensing was exactly as the plain meaning of the statute indicated. House Report No. 99-682(I) provides the following insight:

[T]he penalties contained in this legislation are interpreted to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment, or referral of undocumented aliens. *They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation.*⁴⁵

Declaring the employer ordinances expressly preempted ignores the plain language and meaning of the statute. Further, this holding disregards the congressional report, which is directly contrary. Given the plain language of the statute coupled with the House Report, it seems clear that Congress' intent was to expressly preserve state and local control over businesses.

Despite the plain meaning, the *Lozano* court found that Congress did not intend for subordinate governments to retain the right to revoke business licenses. This court held the following: "[I]n the instant case, Hazleton suspends the business permit of those who violate its Ordinance, not those who violate IRCA. Thus, the licensing exception to State and local preemption is not applicable."⁴⁶ The court's analysis is an attempt to bifurcate the federal and local laws so that violation of one does not necessarily violate the other. This reasoning is flawed because it fails to recognize that the municipal ordinance is but a local reinforcement of federal law. The court's decision essentially asserts that states and cities are not authorized to ensure that its businesses obey federal law. At its core, this holding asserts that the state and city cannot create its own laws to protect its own local interest, a local interest that also ensures that federal law is followed. Additionally,

the employment of unauthorized aliens including anti-immigration discrimination provisions. Allowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives." 496 F. Supp. 2d 477, 523-24 (M.D. Pa. 2007).

45. H.R. REP. NO. 99-682(I), at 5661 (1986) (emphasis added).

46. *Lozano*, 496 F. Supp. 2d at 520.

the court's holding attempts to minimize the inherent power of states and cities to exercise their police powers. Traditionally, states and cities have had the inherent police authority to protect its citizens and regulate businesses, and the court's holding essentially prohibits cities from doing so.

In contrast to *Lozano*, a Louisiana State Court of Appeal addressed a similar issue in a case nearly twenty years ago. In 1988, the Louisiana First Circuit Court of Appeal decided *Garcia v. State*, which involved an employer who knowingly employed eight illegal immigrant workers.⁴⁷ Louisiana state law prohibited employers from knowingly employing illegal aliens and imposed a civil fine upon conviction. *Garcia* challenged the fine arguing that the state law was preempted; the first circuit disagreed and ruled that the law was valid. The court, citing to *DeCanas v. Bica*, held that "the fact that aliens are the subject of a state statute does not render the statute a regulation of immigration."⁴⁸ Additionally, the court held that "Louisiana's provisions merely contain those police powers of the states 'to regulate the employment relationship to protect workers within the state.'"⁴⁹ *Garcia* is significant because it illustrates judicial interpretation of the illegal immigration preemption analysis intertwined with state police powers in the wake of *DeCanas* and soon after the promulgation of the 1986 section 1324. In short, *Garcia* demonstrates states' interpretation of the Supreme Court's *DeCanas* ruling and new immigration statutes immediately following their promulgation. *Garcia* illustrates that subordinate governments have always believed it to be within their police powers to regulate local businesses, and courts have supported this contention. Furthermore, *Garcia* clearly and unequivocally held that state legislation which mirrors federal law, with the purpose to protect its workers and citizens, is not preempted but rather is a valid use of state police powers.

It is important to note that state and local laws that do not conflict with federal law or objectives are not preempted, but those ordinances that have a legitimate purpose are a valid exercise of police powers. This is not a new concept and, as *Garcia* illustrates, has been respected even in the controversial arena of illegal immigration. Therefore, an ordinance is valid if it utilizes police powers to enforce business license suspension, in accordance with the power expressly reserved to it pursuant to section 1324.

47. 521 So. 2d 608, 610 (La. App. 1st Cir. 1988).

48. *Id.* at 613.

49. *Id.* at 614.

2. Field Preemption

The employer provisions do not attempt to directly regulate immigrants; thus, an argument that they are regulating immigration policy is flawed. No ordinance previously discussed attempts to create standards for determining whether someone is legally or illegally in the nation. Rather, the ordinances rely upon a federal determination of legal status before a city takes any action. Even after a local government receives federal notification that an employee is illegally working in the city, the only action that the city takes is to suspend the local business's license. As applied to employers, the ordinances discussed strictly adhere to federal law and standards in their enforcement. The city takes no direct action against the illegal worker and therefore the ordinance is not an attempt to regulate immigration policy. If any ordinance attempts to regulate immigration policy, it will be invalid; Congress completely occupies this field thereby preempting any state law or municipal ordinance that attempts to concurrently regulate immigration. Thus, in determining whether the ordinances are field preempted, the first step must be to determine whether they regulate immigration at all.

The *Lozano* court reasoned that the ordinances regulate immigration because local code enforcement officers are required to make independent immigration status determinations. However, the ordinances do no such thing; rather, they explicitly require the code enforcement officer to obtain immigration status documents and then verify them with the federal government.⁵⁰ It is only after the city receives a report that an employee is an illegal immigrant that an employer is given three days to remedy the situation. The ordinance does not seem to divest any authority to the code enforcement officer to independently determine immigration status. Thus, the allegation that the code enforcement officer is unilaterally determining immigration status is unfounded.

Critics attacking these ordinances are not alleging that they are vague or ambiguous but rather argue that code enforcement officers are turned into de facto renegade and self-deputized

50. Hazleton, Pa., Illegal Immigration Relief Act Ordinance § 4B3 (July 16, 2006), providing:

In instances where an unlawful worker is alleged to be an unauthorized alien, as defined in United States Code Title 8, subsection 1324a(h)(3), the Hazleton Code Enforcement Officer shall submit identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373, the immigration status of such person(s), and shall provide the business entity with written confirmation of that verification.

immigration officials. The ordinances may not be the best written legislation, but it is clear that no code enforcement officer can independently make the decision to declare an employee illegal. The employment ordinance requires that after a valid complaint⁵¹ is filed with the city, an employer must submit documentation to a city code enforcement officer, who then verifies the employee's status with federal agencies; there is no independent determination being made by any city official.⁵² The Court's *DeCanas* ruling indicates that unless there is a strong showing of Congressional intent to oust concurrent legislation, state or local ordinances that indirectly impact immigration policy will not be preempted. In the instant matter, current federal legislation does not indicate congressional intent to prohibit state and local governments from suspending business licenses.⁵³ In fact, the *Lozano* court was forced to find that the license revocation was the "ultimate sanction" in order to circumvent the express the statutory language that reserved the licensing authority to cities and states.

The *Lozano* holding ignores the obvious exception that Congress provided to the states to retain their ability to revoke, renew, suspend, or reissue licenses for business. If Congress had intended to fully preempt any subordinate government sanctions upon employers who employ illegal immigrants, then it is unlikely that this express exception would have been included. Additionally, this exception may be Congress's acknowledgment that cities and states have inherent control and authority over local

51. *Id.* § 4B2, providing: "A complaint which alleges a violation solely or primarily on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced."

52. *Id.* § 4B3, providing:

Upon receipt of a valid complaint, the Hazleton Code Enforcement Office shall, within three business days, request identity information from the business entity regarding any persons alleged to be unlawful workers. The Hazleton Code Enforcement Office shall suspend the business permit of any business entity which fails, within three business days after receipt of the request, to provide such information. In instances where an unlawful worker is alleged to be an unauthorized alien, as defined in United States Code Title 8, subsection 1324a(h)(3), the Hazleton Code Enforcement Office shall submit identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373, the immigration status of such person(s), and shall provide the business entity with written confirmation of that verification.

53. 8 U.S.C.A. § 1324a(h)(2) (2006), entitled Preemption, providing: The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

businesses because of their potential effects upon the local community.

The employer provisions do not impose criminal or civil penalties directly upon immigrants but rather take aim at the licenses of local businesses who profit by violating federal law and imparting the costs of their trespasses upon the local community. The cities initially issue business licenses, and they subsequently monitor, revoke, reissue, or suspend licenses for violating any of a number of ordinances or laws. Thus, although the ordinances may indirectly touch upon immigration issues, the ordinances are regulations of local businesses and local interests. Congress has not pervasively regulated local business licenses nor has Congress mandated a federal policy or program that restricts business licenses for those employing illegal immigrants; rather, Congress has expressly provided that subordinate governments should continue to regulate licenses.⁵⁴

States and cities have inherent police powers to protect their citizens. These police powers are not suspended simply because Congress regulates in a particular area. As a general rule, Congress has exclusive authority over interstate commerce, while corporation and business law are essentially within the states' domain. Similarly, interstate commerce is the most pervasively regulated area in the exclusive domain of Congress; however, state and local ordinances are not *per se* preempted simply because Congress has created intricate regulation in the field. State and local ordinances that do not present undue or unjustified burdens upon interstate commerce are not *per se* preempted.

If the Commerce Clause analysis is applied to the local ordinances, then it seems clear that they are not preempted. The employment ordinances do not present an undue burden that clearly exceeds the benefits to the cities. The cities are supporting the increased expenses resulting from an influx of immigrants, so they have a significant interest in addressing illegal immigration. Thus, the states and cities are fully empowered to ensure that businesses within their jurisdictions are not imposing undue harm upon the community.

Cities and states issue, suspend, or revoke business licenses for a number of different reasons. A city that suspends a restaurant or bar's liquor license as a result of persistent violations is exercising its inherent police power to protect its citizens. This is very similar to the instant matter, as the states and cities are claiming legitimate harm to their communities as a result of employers deliberately and repeatedly violating federal law; the local ordinances do not

54. *Id.* § 1324a(h)(2).

attempt to undermine any uniform national standards. Additionally, Congress has not pervasively regulated the issuance of licenses to businesses that employ illegal entrants. Therefore, cities and states are not preempted by federal law from regulating business licenses.

This analysis illustrates that the employer provisions are valid because Congress has not intended to oust state or local control over the issuance, suspension, or revocation of business licenses. Additionally, Supreme Court jurisprudence does not indicate that local governments are restricted from regulating their own communities because local ordinances may potentially impact illegal immigration; in fact, it is quite the opposite. Congress and the Supreme Court recognize that local governments must regulate local concerns and are authorized to do so unless there is an intent to remove them from either the larger field of total immigration policy or the smaller field of business licenses; in this case, there is no evidence of this intent and thus these types of employer provisions are authorized.

3. *Conflict Preemption*

The municipal employer provisions do not conflict with the federal statute or congressional objectives but rather further Congressional purpose by deterring the employment of illegal entrants. The Supreme Court held that local law is presumed valid and is only preempted when the federal scheme is undermined by the local law.⁵⁵ The Court stated the following in *DeCanas v. Bica*:

[C]onflicting law absent repealing or exclusivity provisions should be preempted . . . only to the extent necessary to protect the achievement of the aims of the federal law,

55. Examples of local ordinances that are clearly conflict preempted are sanctuary cities. In stark contrast to municipalities that attempt to enforce federal law are the abundance of sanctuary cities that continue to grow in the face of increased federal enforcement. Self-declared sanctuary cities or states are those that openly prohibit city employees from inquiring into the legal status of people and also restrict information sharing about illegal immigrants with federal authorities. Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism Or Improper Dictates?*, 16 Pepp. L. Rev. 297 (1989); Ruben Navarrette, *Commentary: Don't Confuse Immigrant Victims with Villains*, CNN, Aug. 5, 2008, <http://www.cnn.com/2008/POLITICS/08/04/navarrette.immigration/index.html>. These cities openly flout federal laws which prohibit the knowing harboring or employment of illegal aliens. These sanctuary cities have not faced constitutional challenge despite their intentional interference with and violation of federal law. Additionally, these laws are seemingly preempted by their express conflict with federal law, yet they continue to thrive unchallenged.

since the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding the [state scheme] completely ousted.⁵⁶

Federal law provides criminal and civil sanctions for knowingly or with reckless disregard employing an illegal immigrant. The state and local ordinances simply utilize their inherent power, which Congress reserved to them in its saving clause, to suspend and revoke licenses for repeated violations of section 1324. Thus, the local ordinances and the federal statute are simply two sides of the same coin, which have the same purpose and the same effect: preventing the employment of illegal workers. Traditionally, local laws have withstood scrutiny if they do not add to or conflict with the federal law and thus allow compliance with both; this is illustrated in the recent immigration case of *Incalza v. Fendi North America*.

In *Incalza*, the Ninth Circuit Court of Appeals upheld a California law after determining that both federal and state requirements and objectives could simultaneously be achieved.⁵⁷ *Incalza* is significant for two reasons. First, it illustrates the court's adherence to the long standing presumption that ordinances are valid and are not preempted. Second, it demonstrates that a state law that differs from federal law is not *per se* preempted. If the *Incalza* reasoning is applied to the instant matter, it seems clear that the employer provisions do not conflict with federal legislation.

Incalza involved California law that created a cause of action for all workers who were terminated if there had been an express or implied agreement that they would not be discharged without good cause.⁵⁸ California's law applied equally to illegal entrants as well as citizens and resident aliens. In contrast, subsection 1324a(a)(2) makes it illegal "after hiring an alien for employment in accordance with [the Act] to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."⁵⁹ Thus, the issue was whether the state law conflicted with federal law and was thereby preempted; the Ninth Circuit held that it was not. The court found that federal law permitted an employer to suspend an illegal worker while the employee attempted to rectify his immigration status. In short, the Ninth Circuit found that it was possible to comply with both the state and federal laws without

56. *DeCanas v. Bica*, 424 U.S. 351, 358 n.5 (1976).

57. 479 F.3d 1005.

58. *Id.*

59. 8 U.S.C. § 1324a(a)(2) (2007).

violating either one and thus interpreted the construction of the two statutes in such a fashion that the state law was upheld *and* the federal statute was not undermined.

In *Incalza*, the California statute openly creates a conflict between the state and federal laws. Nevertheless, the *Incalza* court upheld the state law because it is possible to construe California's law so that it is not in conflict with section 1324.⁶⁰ In the instant matter, it is not necessary to engage in the type of statute interpretation conducted in *Incalza* in order to find both statutes valid because the immigration ordinances mirror federal statutes.

In contrast to the presumption of constitutionality applied in *Incalza*, the *Lozano* court found that Hazleton's employer ordinance was conflict preempted in seven different areas. One area was the knowledge requirement. The court found that Hazleton's ordinance imposed strict liability on employers of illegal workers as opposed to the federal statute, which contains a knowledge requirement.⁶¹ This argument simply overlooks the procedures of the local ordinances. First, if the employer voluntarily enrolls in the federal Basic Pilot Program then he is not subject to local code enforcement. Second, the local ordinances require that the employer provide documentation to the code enforcement officer upon receipt of a valid complaint. If it is determined that the immigrant is illegally within the United States after verifying the immigration status with the federal government, the employer is notified of the violation, which means that he now has knowledge of his offense. He has knowledge of the illegal status because the code enforcement officer has verified the worker's status with the federal government and has thereafter transmitted this information to the employer. Therefore, the federal requirement that an employer must be found to have "knowingly or with reckless disregard employed an illegal worker" is met.

The *Lozano* court also found that the Hazleton ordinance conflicts with federal law because the local law requires a code enforcement officer to retrieve status documents from an employer and then verify the employee's legal status with the federal government.⁶² Federal law, on the other hand, requires an employer to examine the documents and requires the employee to fill out an I-9 form, which is then transmitted to the federal government for verification. It is essential to understand the procedure under which these municipal ordinances operate. First, a code enforcement officer only seeks verification from the

60. *Incalza*, 479 F.3d at 1013.

61. *Lozano*, 496 F. Supp. 2d at 526.

62. *Id.*

employer about an employee's legal status after a valid complaint has been filed. At this point the city code enforcement officer simply takes copies of the documents and verifies the authenticity with the federal government. Inserting the code enforcement officer into the mix does not release the employer from his federally mandated duty to inquire into his employee's legal status; thus, there is no conflict. Therefore, because employers can satisfy both federal and state or local law, the ordinances are not preempted.

The *Lozano* court held that Hazleton's ordinance also conflicted with federal law because the city required all city agencies to participate in the Basic Pilot Program. This ruling fails to consider the Tenth Amendment, which prohibits the federal government from commandeering state or local officials to carry out federal policy or administrative programs.⁶³ In short, the federal Basic Pilot Program can be nothing but voluntary because of the limitations imposed by the Tenth Amendment; however, the Tenth Amendment does not limit state and local governments from requiring their own agencies to participate in the program without violating any constitutional provision. Therefore, the court erred in its determination that a local law that requires participation in the federal Basic Pilot Program conflicts with the federal objectives that are purely voluntarily.

The *Lozano* court held that the local ordinance conflicted with federal law because the city did not provide an appeals process to the employee but rather only to the employer; however, this does not render the ordinance invalid.⁶⁴ The city cannot directly regulate the illegal entrant because Congress has pervasively regulated in this field. Congress has already provided the means for the worker to appeal his illegal status and thus the city is unable to create concurrent legislation in this field. Cities can only regulate local business licenses because this is the area that Congress has expressly reserved for local control; therefore, the city is only authorized to provide an appeals process for the employer. The Hazleton ordinance does not deprive the employee of his appeal rights because he still retains these rights under the federal law.

The *Lozano* court also found Hazleton's ordinance conflict preempted because it did not contain an anti-discrimination

63. *Printz v. United States*, 521 U.S. 898 (1997). *See also* U.S. CONST. amend. X, providing: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

64. *Lozano*, 496 F. Supp. 2d at 527.

provision, which is present in federal law.⁶⁵ The city's ordinance does mandate, however, that a complaint based solely upon race or nationality is not valid and will not be investigated by the city. Therefore, the city did attempt to discourage discriminatory reporting and complaints.

Conflict preemption may also occur if a state or local ordinance is more burdensome than its federal counterpart. In *Hines v. Davidowitz*, the United States Supreme Court held that a state or local government cannot impose continuing burdens upon aliens that are not contemplated within the federal plan.⁶⁶ Upon these grounds, opponents may argue that requiring immigrants to supply immigration status to a code enforcement officer is unduly burdensome. This argument fails for two reasons.

First, the employer should already have copies of his employee's identification documentation as well as a federal I-9 form when the employee was hired. Additionally, the ordinances require that the employee submit his proof of legal immigration status directly to his employer who retains copies of this information. Therefore, if there is a valid complaint concerning the employee's legal status, the employee is not even aware that an investigation is being conducted, and consequently there is no burden upon him.

Second, the employer ordinances do not require the employer or the employee to do anything except submit information to a code enforcement officer; this makes this process even less burdensome than the Basic Pilot Program. The Center for Immigration Studies reported the results of a Department of Homeland Security survey which attempted to gauge the impact that the Basic Pilot Program would have upon employers. The assessment revealed that "92% of employers thought that the verification process did not overburden their staff" and "93% of employers thought Basic Pilot Program was easier than the existing I-9 process."⁶⁷ Thus, the employer ordinance does not impose an additional burden upon either employers or employees that would render it conflict preempted. As stated in *Equal Access Board of Education v. Merten*, "There is no Supremacy Clause bar to state officials' examination of an applicant's federal immigration documentation to confirm the applicant's self-reported immigration status."⁶⁸ There are no additional burdens

65. *Id.* at 529.

66. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

67. VAUGHAN, *supra* note 38.

68. *Equal Access Bd. of Educ. v. Merten*, 325 F. Supp. 2d 655, 660 n.8 (E.D. Va. 1994).

upon either the worker or the employer simply because the employer may have to verify that he is complying with federal law and also thereby verify that he is not injuring his local community.

B. Tenancy Provisions Analysis

Municipalities have attempted to rely upon the anti-harboring provision in federal law, which imposes criminal penalties for the harboring of illegal immigrants, to enact ordinances that prohibit the leasing of residential property to illegal immigrants.⁶⁹ The ordinances revoke the license of property managers and prevent the owner from receiving rent for the unit while the violation continues.

The ordinances take aim at property managers who knowingly allow an illegal entrant to reside in a dwelling unit unless expressly permitted by federal law. These provisions sanction the property manager and property owner who are aware of the illegal status of his tenants but choose to allow the occupants to remain in the unit.⁷⁰ If a property manager continues to allow the tenant to remain after being notified of the tenant's illegal status, the manager is deemed to be harboring the family and is therefore in violation of section 1324.⁷¹ The tenancy provisions are conflict and field preempted because they potentially impose burdens not only upon aliens but also upon other cities and states. These types of ordinances impose residency conditions and restrictions that are beyond those contemplated by the federal government.

69. 8 U.S.C. § 1324(a)(1)(A)(iii) (2007). This section prohibits the following: [A]ny person who knowingly or in reckless disregard of the fact that an alien has come to, entered, or remains in the US in violation of law, conceals, harbors, or shields from detection or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.

70. See *United States v. Lopez*, 521 F.2d 437 (2d Cir. 1975), *cert. denied*, 423 U.S. 995 (1975) (holding that harboring, under the federal statute, included allowing a known illegal alien to remain in an apartment). The *Lopez* court stated the following:

Although "harbor" has been defined to have several meanings, including "to receive clandestinely and conceal," its primary meaning is "to give shelter or refuge to". At the time of the conduct forming the basis of the charges against Lopez it was readily apparent, as the Supreme Court had noted in *Evans*, that the term "harbor" might reasonably be construed to encompass the providing of shelter to illegal aliens, unconnected with the smuggling of them into the United States. Lopez, therefore, had fair warning that his conduct might be held to violate § 1324, even if that statute were construed along the lines now advocated by him.

Id. at 441 (citations omitted).

71. See BLACK'S LAW DICTIONARY, *supra* note 22 (defining "harboring").

1. Field Preemption

The tenancy provisions are more vulnerable to constitutional challenge upon grounds that they regulate immigration. The tenancy provisions potentially prohibit both legal and illegal immigrants from residing in the city. In essence, these ordinances could potentially close off an entire region from immigrants and in a sense create a kind of local deportation, which is an exclusive right of Congress. If the effect of the ordinances were a local deportation, then it is likely that the ordinance would be preempted on grounds that the municipalities were attempting to regulate immigration. Valley Park's ordinance does subordinate itself to any federal law, which allows the illegal to remain despite an illegal status, "unless such harboring is expressly permitted by federal law."⁷² This is a very narrow exception, as it is unlikely that federal law expressly permits harboring. Valley Park may be attempting to defer to federal determinations that permit an illegal alien to remain in the country while his or her case is on appeal, but the true meaning of the "expressly permitted" language is ambiguous and thus this clause is ineffective.

Immigration regulation not only encompasses those guidelines that determine an immigrant's entrance into the United States but also encompasses the conditions that aliens are subject to while they remain in the country. The tenancy ordinances are arguably imposing regional residency restraints upon aliens. Therefore, tenancy provisions potentially impose a significant burden upon federal immigration policy because of the possible restrictions. It seems clear that Hazleton and other cities will argue that they are not imposing any sort of burden upon aliens because they are targeting illegal entrants who are not authorized to reside in this nation. This argument is compelling, but, as will be addressed subsequently, these tenancy provisions potentially create an alien database, which is a regulation of aliens and thus beyond the police power of subordinate governments.

Hazleton's tenancy provision, which requires every occupant of the city to register with the city in order to facilitate the ease of illegal immigration checks, is likely preempted by the federal government's authority to determine the aliens admitted into the nation and the conditions imposed during their stay in the United States. As recognized in *Lozano*, Hazleton's ordinance is similar to an alien registration requirement that Pennsylvania attempted to adopt in *Hines v. Davidowitz*.⁷³ In *Hines*, the State of Pennsylvania

72. Valley Park, Mo. Ordinance 1708 § 5A (July 17, 2006).

73. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

required all aliens over the age of eighteen to register with the State.⁷⁴ Pennsylvania created this law prior to any federal alien registration program, but eventually a federal program was created. The federal law, however, required aliens fourteen years and older to register with the federal government and thus the two laws conflicted. The Supreme Court held Pennsylvania's law preempted and stated:

[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.⁷⁵

Hazleton's ordinance is distinguishable from *Hines* on several grounds. First, in *Hines* the state law expressly conflicted with the federal law because of the difference in age requirements. Second, the Pennsylvania statute in *Hines* attempted to directly regulate all legal and illegal aliens while Hazleton is attempting to regulate the issuance of business licenses. Hazleton is attempting to reduce the incentive for businesses to violate federal law and increase costs within the city.⁷⁶

Even if the tenancy provisions are ultimately declared valid, whether they will be successful is debatable. It seems reasonable to conclude that the immigration influx will not suddenly dissipate simply because the tenancy provisions make it more difficult to find a place to live in the city. Rather, it seems logical to conclude that illegal immigrants will simply find private homes or other sanctuaries where they can stay and thereby evade law enforcement. Assumedly, federal policy objective and enforcement schemes are aimed at removing illegal immigrants, and thus the city's tenancy ordinances may conflict with and undermine these federal goals by driving illegal immigrants into seclusion.

2. Conflict Preemption

Tenancy provisions attempt to restrict the harboring of illegal aliens in accordance with federal law; thus, it would appear that the

74. *Id.* at 56.

75. *Id.* at 66–67.

76. United States Senate Committee on the Judiciary: Testimony of Honorable Louis Barletta, Mayor of City of Hazleton (2006), http://judiciary.senate.gov/hearings/testimony.cfm?id=1983&wit_id=5495.

provisions do not conflict facially with federal immigration policy. Given the statutory scheme, Congress' intent is arguably to restrict illegal entrants from residing in the United States; if the analysis focused solely upon congressional intent, then the ordinances would be valid. Cities have rested upon this presumption in their creation of their tenancy provisions, but this conclusion may not be entirely accurate. As recognized by the *Lozano* court, the tenancy ordinances conflict with federal policy objectives because they fail to account for those aliens who have been allowed to remain in the country but who are not legally present. More significantly, the tenancy provisions are invalid because they create a database of aliens, which conflicts with federal policy.

Creating a database of aliens imposes additional burdens upon aliens who are already registered with the federal government. In Hazleton, all dwelling occupants of the city are required to fill out an occupancy card for the purpose of creating and maintaining a database of potential illegal immigrants. Farmers Branch, on the other hand, simply requires the landlord to make copies of occupants' legal status documents and retain them for two years. The cities are clearly acting in a vacuum as the federal government has not attempted to require occupancy cards in order to create a database of potential illegal entrants. Despite Congress' lack of activity in this area, the cities' express purpose is to create databases of potential illegal entrants. Therefore, it would appear that these cities are in conflict with federal policy which does not mandate this local record keeping.

IV. POLICY

As previously stated, the illegal immigration debate is a sensitive and heated topic. As such, this Comment has attempted to focus solely upon the legal aspects of the issue, via statutory interpretation and by engaging in a preemption analysis of two provisions, in an effort to draw a distinction between acceptable and unacceptable exercises of local authority in the field of immigration. Nevertheless, a full analysis would not be complete without a brief examination into the possible policy ramifications of allowing *any* local participation in immigration matters.

Opponents of municipal ordinances argue that allowing states and cities to impose licensing restrictions upon local businesses will disrupt the uniform immigration policy and thus may have a negative impact upon the nation's foreign policy.⁷⁷ This argument

77. The *Lozano* court stated the following: "United States foreign relations is affected by the manner in which the balance is struck. Excessive enforcement

is flawed in two key ways. First, federal law prohibits an employer from knowingly employing illegal immigrants and also prohibits the harboring of illegal immigrants. The municipal ordinances reflect these same objectives, and because they simply mirror federal policy, they logically cannot be deemed to be inconsistent with federal policy. Second, if the licensing exception expressly provided to the states and cities creates a non-uniform policy, then it is Congress, and Congress alone, that must adjust the statute to reflect their concern for foreign relations. It is usurpation of authority for the courts to determine this.⁷⁸

Assuming that both the federal employer provisions and the anti-harboring statutes are aimed at preventing illegal immigration, states and cities must support the policy in order for it to be effective. The employer provisions do not undermine the federal prohibition against employment of illegal immigrants but rather remove the incentive to violate the federal law. In this way, the cities are providing needed assistance to the federal government. Judge Learned Hand aptly pointed out that “it would be unreasonable to suppose that [the federal government’s] purpose was to deny itself any help that the states may allow.”⁷⁹ Judge Hand’s insight into the relationship between the federal government and its dependence upon states and cities is a logical analysis of the instant matter where concurrent legislation between federal and local governments exists. In support of Judge Hand’s insight is the Clear Act proposal introduced in September 2007. The Clear Act reaffirms states and cities inherent police powers to enforce immigration laws and protect its citizens.

[L]aw enforcement personnel of a State, or of a political subdivision of a State, have the inherent authority of a sovereign entity to investigate, identify, apprehend, arrest, detain, or transfer to Federal custody aliens in the United States (including the transportation of such aliens across State lines to detention centers), for the purpose of assisting in the

jeopardizes our alliances and cooperation with regard to matters such as immigration enforcement, drug interdiction and counter-terrorism investigations.” 496 F. Supp. 2d 477, 528 (M.D. Pa. 2007).

78. Concern with disrupting a uniform national policy must focus upon sanctuary cities. These cities overtly violate federal law and yet escape constitutional challenge. If there is concern about uniform national policy then ordinances that expressly prohibit employees from reporting illegal immigrants to federal authorities must be struck down as preempted.

79. Brief of Respondent at 31, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06-cv-01586-JMM) (quoting *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928)).

enforcement of the immigration laws of the United States in the course of carrying out routine duties. This State authority has never been displaced or preempted by Congress.⁸⁰

What is most interesting about the Clear Act of 2007 is that the bill clearly states that the inherent police powers of states and municipalities has never been displaced or preempted by Congress in the field of immigration enforcement. Given the recent jurisprudence, which attempted to interpret congressional intent to preempt state and local enforcement of immigration policy, it seems clear that the Clear Act proposal indicates that there is no congressional intent to either expressly or impliedly completely occupy the field of enforcement of immigration policies. If this interpretation of the Clear Act is accurate, then the *Lozano* court's field preemption analysis is flawed.

V. RECOMMENDATIONS

The immigration crisis is increasingly becoming a central concern to citizens and officials throughout the nation. States and cities will continue to devise and enact laws in order to deal with perceived threats to their communities.⁸¹ Undoubtedly, these laws will face constitutional challenges. This begs the question, what laws may a state or city enact to mitigate the burdens of illegal immigration but which are not preempted?

One scholar has summarized Supreme Court jurisprudence on this issue.

A state may endeavor to deter illegal immigration, not as an end of its own, but as a means toward protecting traditional state concerns To borrow a phrase, if aliens "constitute a peculiar source of evil at which [a state law] is aimed," it may legislate against them, not to deter immigration per se, but to ameliorate the impact they cause.⁸²

80. Clear Act, H. R. 3494, 110th Cong. (2007).

81. Recently, cities have begun to enact anti-loitering provisions, which target day laborers and their employers. Another suspect ordinance gaining popularity seeks to impose residency limits upon rental properties. This provision restricts the number of individuals that can live in a single residential property. The point of these examples is to illustrate that simply striking down one ordinance will not eliminate the problem, but rather cities and states will continue to find new ingenious ways of attempting to mitigate the consequences of illegal immigration.

82. Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 986-87 (1995) (citing *Plyer v. Doe*, 457 U.S. 202, 228 (1982)).

This reference to *Plyer v. Doe* is especially applicable in the instant matter for two reasons. First, *Plyer* concerned the impact of *illegal* immigration upon cities and states. This is an important distinction because ordinances that attempt to regulate aliens *legally* admitted into the country are illegitimate. States and cities have no authority to attempt to regulate *legal* aliens' employment, residence, or any other condition imposed upon them. This is because Congress alone determines the policies and procedures through which one may enter and remain in the United States. *Illegal* entrants, however, are prohibited under federal law and thus are obviously distinguishable from legal aliens. Nevertheless, states and cities may not create their local sanctions targeted at illegal entrants. They may, however, regulate those industries which profit from imposing costs upon the city. Second, *Plyer* states that local legislation may attempt to reduce the burden of illegal immigration via legislation.⁸³ The purpose of the legislation is a key ingredient in the determining whether the ordinance is legitimate; an ordinance that is aimed at reducing crime and eliminating economic crisis has the foundation of a valid ordinance. The United States Supreme Court recognized this in *DeCanas* and affirmed it in *Plyer*. The Court stated, "The states do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal."⁸⁴ These types of local ordinances are not attempting to directly regulate immigration policy but rather are simply attempting to reduce the negative impact illegal immigration has upon the community.

Ordinances must be crafted so as not to impose burdensome supplemental regulatory requirements upon aliens, illegal or legal. For example, Louisiana Revised Statutes section 14:100.13 requires that nonresident aliens and alien students may not operate motor vehicles without documentation demonstrating that they are lawfully present in the United States. Violating the statute subjects the offender to no more than a \$1,000 fine and/or imprisonment for not more than one year with or without hard labor or both the fine and imprisonment.⁸⁵

83. See *Plyer*, 457 U.S. at 228 (1982) (where the court acknowledges that while the Texas statute in question is illegitimate, it also recognizes that "[s]tates might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population . . .").

84. *Id.* at 225.

85. The Louisiana Fourth Circuit Court of Appeal recently held that this ordinance was unconstitutional as it was preempted by federal immigration legislation. *State v. Lopez*, 948 So. 2d 1121 (La. App. 4th Cir. 2006).

Second, the ordinances must not be a direct regulation of aliens. Historic jurisprudence seems to suggest that direct regulation of aliens will be preempted while regulation of ancillary matters that indirectly impact immigration will not. For example, the invalid Louisiana motor vehicle statute directly imposes burdens, requirements, and conditions upon aliens whereas the Hazleton, Valley Park, Farmers Branch, and Arizona laws regulate businesses within its borders; they do not attempt to directly regulate illegal or legal aliens. Additionally, federal law provides express authority to subordinate governments to regulate the licenses of its businesses with respect to violation of federal immigration policy. This is not the case in the Louisiana statute. The Louisiana statute does not regulate business licenses and is not aimed at harboring but rather imposes an additional requirement directly upon all aliens that the federal government does not impose. This additional requirement is burdensome and is therefore preempted.

Third, the ordinances must not be vague or ambiguous. The ambiguity in the ordinances rests in two areas: with whom in the federal government the cities are verifying their information and what documentation is being used to determine the legal status. It may be that the ordinances are impliedly suggesting that the Department of Homeland Security or that the Social Security Administration is consulted, as it is used in the Basic Pilot Program. Similarly, the ordinances implicitly suggest that the same documentation required to hire a person (I-9 information) is required to prove status to the city code enforcement officer. If state and municipal legislation are to withstand attack, they must be written to expressly reflect the exact federal agency who is determining the legal status and which documents are being used to determine legal status.

The Hazleton, Valley Park, and Farmers Branch ordinances do not authorize code enforcement officers to independently determine legal status but rather require the officers to verify the status with the federal government. The ordinances do not, however, expressly prohibit it and thus differ from Arizona's legislation. This is an important distinction because the municipal ordinances have been challenged upon grounds that cities are independently making alien status determinations.

Thus, in order to shield future ordinances from attack, state and local legislation must be written to explicitly state that the documentation required by the code enforcement officer is the same documentation that Homeland Security and the Social Security Administration use to verify legal status. Statutes and ordinances must also expressly reflect that an employer may

appeal a determination that he is knowingly employing an illegal worker. Although local ordinances contain an implied requirement that employers have knowledge of their employees illegal status before the license is revoked, in order to shield the ordinances from challenge they must expressly provide a knowledge requirement.

Finally, ordinances must adopt federal standards rather than supplement them. The Farmers Branch ordinance was struck down for two reasons. First, the city failed to use federal immigration standards for determining illegal status. Second, the ordinance required the property manager to examine documentation in order to verify legal status rather than allowing the federal government to determine legal status. Interestingly, the *Lozano* court found the employer provision preempted in part because federal law required the employer to determine legal status while the city ordinance authorized the code enforcement officer to verify status with the federal government. It appears that if an ordinance is to avoid being preempted it must strictly adhere to federal immigration standards, which means not only adopting the appropriate definitions of illegal entrant but also ensuring that only federal agencies determine legal status.⁸⁶

Undoubtedly, state and local ordinances that attempt to reduce the impact of illegal immigration upon its communities will be challenged. However, these ordinances will not be deemed preempted if they attempt to operate within the field expressly left open to them by Congress.

VI. CONCLUSION

Since the Supreme Court's ruling in *DeCanas v. Bica*, it has been settled law that state legislation or municipal ordinances that indirectly impact immigration matters are not *per se* preempted. Despite this long standing rule, recent court decisions have found municipal ordinances that suspend or revoke business licenses of employers who violate federal law invalid. These rulings rest upon tenuous grounds, not only because they ignore the express exception that Congress provided to subordinate governments to suspend or revoke licenses, but also because they ignore the inherent police powers that cities and states retain to protect their citizens and their communities.

86. The Northern District of Texas determination that the property manager was making an independent determination of legal status is directly contrary to the federal employer provision, which requires the employer to examine identity documentation for validity.

This Comment does not suggest, however, that all municipal ordinances are valid. In fact, any state legislation or ordinance that attempts to directly regulate aliens or that attempts to impose regional burdens are invalid for a number of reasons; one of which, for example, is that they interfere with Congress' exclusive right to regulate immigration policy. For this reason, tenancy ordinances, as described herein, are preempted. These ordinances attempt to create a regional alien database from which to run potential illegal alien status checks. Despite the lack of congressional activity in this area and the federal anti-harboring statute, this type of database has a potential for creating significant regional regulation of immigration policy. For this reason, these ordinances are not valid.

This Comment illustrates the difference between ordinances that are not preempted and those that are invalid under the Supremacy Clause by drawing upon two popular ordinances. In doing so, certain conclusions can be drawn: only those ordinances that do not directly regulate immigrants, which do not impose additional regional burdens and that have a valid and legitimate purpose pursuant to local police powers will survive constitutional challenge.

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* The author wishes to thank Professor John Devlin for his unlimited support and guidance.